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**BEFORE THE**
**FEDERAL MARITIME COMMISSION**

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| R. O. WHITE & COMPANY, INC.,<br>CERES MARINE TERMINALS, INC.,<br><br>Complainants<br><br>v.<br><br>PORT OF MIAMI TERMINAL OPERATING COMPANY, L.L.C.,<br>CONTINENTAL STEVEDORING & TERMINALS, INC.,<br>FLORIDA STEVEDORING, INC.,<br>P&O PORTS NORTH AMERICA, INC.,<br>P&O PORTS FLORIDA, INC.,<br>DANTE B. FASCELL PORT OF MIAMI – DADE, *aka* MIAMI-DADE COUNTY SEAPORT DEPARTMENT,<br>MIAMI-DADE COUNTY<br><br>Respondents. | ) | DOCKET NO. 06-11 |

**OPENING BRIEF OF**
**Port of Miami Terminal Operating Company, L.C.,**
**Florida Stevedoring, Inc.,**
**Ports America, Inc. (f/k/a/ P&O Ports North America, Inc.), and**
**Ports America Florida, Inc. (f/k/a P&O Ports Florida, Inc.)**

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April 17, 2009

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## I. INTRODUCTION

This is the initial brief of Respondents: (i) Port of Miami Terminal Operating Company, L.C. ("POMTOC"); (ii) Florida Stevedoring, Inc. ("FSI"); (iii) Ports America Inc. (formerly P&O Ports North America, Inc.) ("Ports America"); and (iv) Ports America Florida Inc. (formerly P&O Ports Florida, Inc.) ("Ports America Florida"), in Phase I of this proceeding. It includes proposed findings of fact in numbered paragraphs and a memorandum and conclusions of law. The Complainants are Ceres Marine Terminals, Inc. ("Ceres") and R. O. White & Company, Inc. ("ROW"). Continental Stevedoring & Terminals, Inc. ("Continental"), Dante B. Fascell Port of Miami-Dade (*a.k.a.* Miami-Dade County Seaport Department) (the "Port" or the "Port of Miami"), and Miami-Dade County ("County") are co-respondents.

The issue to be decided by the Administrative Law Judge ("ALJ" or "Judge") is whether Complainants have met their burden of proving that: (i) Respondents, either individually and/or collectively, have violated provisions of the Shipping Act of 1984, as amended (the "Shipping Act") as alleged in the Complaint; (ii) Complainants have suffered injury as a result thereof; and (iii) Complainants are entitled to reparation. Discovery as to the amount of reparations will only take place if this proceeding is remanded by the Commission pursuant to Subpart O of the Rules and Regulations, 46 FR § 502.251, *et seq.*, pursuant to the ALJ's September 4, 2008 Preliminary Order on Discovery Schedule.

The Complaint in this proceeding arose from a simple business dispute, in which Complainants made an offer – or, more accurately, an unrealistic demand – that they be allowed to utilize Respondents' real property, information technology and other assets

with little or no compensation (other than reimbursing Respondents' immediate "out of pocket costs") to compete for stevedoring business in the Port of Miami. Specifically, since 2005, Complainants, through their counsel, have been demanding that they be allowed to use their heavy equipment and personnel within Respondents' privately leased marine terminal facility, and to access and utilize Respondents' proprietary terminal operating information technology system, so that Complainants can advantageously compete with POMTOC members respondents for container stevedoring business.

In 2005, Respondents declined Complainants' initial offer as commercially unacceptable, but made clear that Respondents were (and still are) receptive to reasonable proposals involving fair market compensation. Complainants declined to pursue commercial negotiations or to present an economically realistic proposal, relying on an unprecedented legal theory that the Shipping Act authorizes expropriation of Respondents' terminal property and IT systems.

Complainants would have the Commission grant them an unfair windfall of use and access to facilities and resources for which Complainants have not paid. The relief that Complainants seek would vitiate the rights of quiet enjoyment and other legally enforceable, constitutionally protected property rights for which Respondents have bargained and paid, and on which Respondents rely under their lease with the County. Complainants would have the FMC create unprecedented new federal rights of open access to privately leased marine terminal facilities. Under such a scenario, Complainants – an appendage of a large, well-capitalized Japanese shipping company – could take Respondents' facilities without bearing any of the cost, risk, commitment or investment that the Respondents (all domestic U.S. maritime companies) have

undertaken. Particularly given the current credit crisis and drastic financial downturn, the impacts of allowing Complainants to free-ride on Respondents' capital assets would be extraordinarily unfair and harmful to Respondents' interests. In addition, the approach advanced by Complainants would sow grave uncertainty about the enforceability of property rights in the U.S. terminal industry generally. Investors will think twice about investing in, leasing and developing U.S. marine terminal facilities, if the FMC sets the precedent for throwing the gates of such facilities open to competitors without compensation or investment.

Complainants legal theories and behavior are tantamount to a position that terminal operators approached by competitors seeking access to leased facilities can never say "no," or even "no, but. . ." without risking violation of the Shipping Act. Respondents assert in this matter that Complainants have mischaracterized the Shipping Act's requirements and FMC precedent, all in support of an elaborate effort to get something for nothing.

### A. Background of this Case

This proceeding was initiated by the filing of the Complaint on November 11, 2006. At the same time, Complainants submitted their Initial Discovery Requests to Respondents. On January 25, 2007, POMTOC filed its answer, while other respondents filed motions to dismiss for lack of jurisdiction. In addition, the Port argued that it is a mere department of the Miami-Dade County, and is not an independent *sui juris* legal entity capable of being sued.

On July 2, 2007, the ALJ dismissed the motions to dismiss to all movant-respondents, except Eller-ITO Stevedoring Company, L.L.C. ("Eller-ITO") – which was

dismissed from this case. The ALJ also required Complainants to file an amended complaint to add the Miami-Dade County as co-respondent. On July 26, 2007, POMTOC and its members filed their answers to the amended complaint and submitted their joint initial discovery requests. On August 6, 2007, the Port filed its answer to the amended complaint and its initial discovery request.

On August 20, 2007, the parties submitted a joint proposed discovery schedule. On October 29, 2007, the ALJ denied Ports America's Motion for Reconsideration and the Joint Motion of Continental, FSI, Ports America, and Ports America Florida for leave to appeal the July 2, 2007 order.

The deadline to file discovery responses was extended on November 27, 2007, on February 4, 2008, and again on August 22, 2008. In March 2008, this proceeding was referred to the Director of the Commission's Office of Consumer Affairs and Dispute Resolution Services, and thereafter the parties began engaging in dispute resolution discussions.

On August 6, 2008, this case was reassigned from Judge Clay G. Guthridge to Judge Paul B. Lang. On August 26, 2008, the ALJ granted Respondents' Motion for Protective Order. On November 25, 2008, the ALJ granted the parties' motion to modify requirement to submit prehearing statements, and on December 9, 2008, the ALJ issued order for submission of evidence and briefs. On December 17, 2008, the parties submitted their prehearing statements. On March 5, 2009, the ALJ issued order on briefing schedule and timing, and required the parties to submit initial briefs by April 17, 2009, and Reply briefs by May 1, 2009. On March 9, 2009, the ALJ issued order on evidentiary issues, denying: (i) Complainants' Objections to Admissibility of

Documentary Exhibits of the Port/County; (ii) Respondents' Motion to Strike Portions of Complainants' Rebuttal Statement; and (iii) Complainants' Motion to Submit a Supplemental Affidavit and/or to Strike Respondents' Improperly Submitted Testimony. On April 10, 2009, the ALJ granted BOE's Motion to Modify Briefing Schedule to allow BOE to submit an *amicus* brief on or before April 24, 2009.

## II. PROPOSED FINDINGS OF FACT

### A. Parties

1. Complainant Ceres performs stevedoring and/or marine terminal services at numerous ports in the United States. Ceres is ultimately wholly owned by the ocean common carrier Nippon Yusen Kaisha of Japan. First Amended Complaint at ¶¶ 2.b and 3.

2. Complainant ROW holds a permit issued by the Port authorizing it to perform stevedoring services at the Port, and has had a lease with the Port for office space and for an area to store its stevedoring equipment. ROW is a wholly owned subsidiary of Ceres. Ceres acquired its interest in ROW in early 2005. During the years preceding Ceres' acquisition, ROW had not had any significant cargo operations (focusing mostly on cruise business) in Miami. *Id.* at ¶¶ 2.a, 3, and 20. *See, also*, Respondents Exh. 11 at 10:10-11:5, 63:4-18.

3. Respondent POMTOC provides marine terminal services in a facility under a long-term lease with the Port. POMTOC is a privately owned Florida limited liability company, which members and respective stakes are as follows: (i) Continental (25% interest); (ii) FSI (25% interest); and (iii) Ports America Florida (50% interest). POMTOC does not provide stevedoring services to ocean common carriers. Also,

container freight station business was never part of POMTOC's operations, either at POMTOC's inception or thereafter. Amended Answer of POMTOC at ¶¶ 5, 15; Complainants Exh. 211 at p. 7 (Response to Request 6.d); Complainants Exh. 218 at p. 2 (Response to Interrogatory 1.a); Respondents Exh. 1 at ¶¶ 7-8.

4. Respondent Continental is one of the founding members of POMTOC. It is a holding company whose only assets are a 25% membership interest in POMTOC and a 50% membership interest in Eller-ITO. Continental does not provide wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, within the meaning of the Shipping Act. Respondents Exh. 11 at 40:9-13; Joint Respondents Motion to Dismiss for Lack of Jurisdiction dated Jan. 25, 2007 ("Respondents MTD"), Declaration of Joseph A. Muldoon, III at ¶¶ 3-4.

5. Respondent FSI is also one of the founding members of POMTOC; it holds a 25% membership interest in POMTOC. FSI is duly licensed to stevedore vessels in the Port of Miami-Dade and Port Everglades, Florida. FSI does not provide wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, within the meaning of the Shipping Act. Respondents Exh. 11 at 40:9-13; Respondents MTD, Declaration of Jorge Rovirosa at ¶¶ 2-3; Respondents Exh. 2 at ¶¶ 7, 9 and 11.

6. Respondent Ports America wholly owns Ports America Gulfport, Inc. (formerly P&O Ports Gulfport, Inc.), a Louisiana corporation, which in turn wholly owns Ports America Florida, a Florida corporation. Ports America does not have and has never had a direct ownership interest in POMTOC. Ports America is engaged at one or more ports in the continental United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, within the

meaning of the Shipping Act. However, it does not furnish wharfage, dock, warehouse or other terminal facilities at the POMTOC marine terminal or elsewhere in the Port of Miami. Affidavit of Stephen A. Edwards in support of Motion to Dismiss of P&O Ports North America, Inc. and P&O Ports Florida, Inc. ("Edwards Affidavit") at ¶¶ 2-3, 5; Complainants Exh. 211 at p. 26 (Response to Request 46).

7. Respondent Ports America Florida owns 50% membership interest in POMTOC and 50% membership interest in Eller-ITO. Ports America Florida operates marine terminals and related businesses in the Port of Tampa, but it does not furnish, and have not furnished, wharfage, dock, warehouse or other terminal facilities at the POMTOC marine terminal or elsewhere in the Port of Miami. Edwards Affidavit at ¶¶ 4-5; Complainants Exh. 211 at p. 26 (Response to Request 45); Complainants Exh. 218 at p. 3 (Response to Interrogatory 4).

8. Former Respondent Eller-ITO is a company duly licensed to stevedore vessels in the Port of Miami. It has been operating in the Port of Miami since 1998, and is the largest contract stevedore in South Florida, working on average 118 vessels per month. It is a joint venture owned by Continental and Ports America Florida, on a 50/50 percentage basis. Eller-ITO does not provide wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, within the meaning of the Shipping Act. Respondents Exh. 16 at ¶¶ 7-8; Respondents MTD, Affidavit of Charles J. Arocha at ¶¶ 2-3.

9. Respondent Port of Miami is a non-*sui juris* department of the Miami-Dade County. It provides certain marine terminal services and leases terminal facilities

to other marine terminal operators for use at the Port. Port's Motion to Dismiss, dated Jan. 25, 2007 ("Port MTD") at p. 2; Port's Answer to the Complaint at ¶ 5.

10. Respondent County is a political subdivision of the State of Florida. Port MTD at p. 2.

### B. POMTOC is a Private Facility Operating under Lease; It is Not a Public Terminal

11. POMTOC was formed in 1993 by four privately owned terminal operating and stevedoring companies so that they might merge their individual existing terminal lands and operations. The members contributed their existing, smaller privately-leased marine terminal facilities and related assets to a limited liability company; taking in exchange membership shares in POMTOC. POMTOC was created at the urging of the Port to improve efficiency and throughput. POMTOC does not, and was never intended to, operate the facility as agent for, or on behalf of, the County or the Port as an open public terminal space. Respondents Exh. 1 at ¶¶ 11-12, 15-17; Respondents Exh. 11 at 41:5-42:25, 59:1-61:20.

12. The original members of POMTOC were: Continental, FSI, S.E.L. Maduro (Florida), Inc. ("SEL"), and Oceanic Stevedoring Company ("Oceanic"), each owning a 25% membership interest. Ports America Florida acquired SEL and Oceanic's interests in POMTOC in two separate transactions, in 2000 and 2003, respectively. Respondents Exh. 1 at ¶ 7; Respondents Exh. 11 at 40:7-13.

13. As far back as any witness can recall, stevedores in Miami have had to invest in a terminal so they could have somewhere to stevedore to and from. POMTOC was formed so the members could continue to have a terminal facility (now shared, through a joint venture) in which to stevedore. Respondents Exh. 12 at ¶¶ 4-5, 20;

Respondents Exh. 13 at ¶ 13; Respondents Exh. 14 at ¶ 6; Exh. A to the Complaint (lease) at pp. 1-2 (Preamble); Respondents Exh. 11 at 39:5-22, 63:19-64:24.

14. POMTOC was created to allow the four private members companies to continue operating much as they did in their prior separate facilities, but with the efficiency gains of the new, pooled terminal configuration. The marine terminal facilities and functions of each member were transferred to POMTOC while the stevedoring operations remained with the members. The reconfigured and combined terminal area and improved gate facility and other technology have allowed POMTOC and its members to serve larger vessels and cargo volumes. Respondents Exh. 1 at ¶¶ 11-12, 14-17.

15. POMTOC provides marine terminal services to ocean common carriers under its Tariff No. 200. These services are provided from POMTOC's privately leased terminal facility in the Port of Miami, which roughly represents the combined terminals of the four founding members. Amended Answer of POMTOC at ¶ 6; Respondents Exh. 1 at ¶ 17.

16. Pursuant to its marine terminal operator schedule (*i.e.*, tariff), POMTOC's services include receiving and delivering cargo to and from an inland carrier (including equipment inspection and trailer interchange report), storage, inspection, and fumigation. POMTOC utilizes its leased area for offering these services. Such services do not include subleasing or otherwise renting or selling real property or property interests to shipping lines. Complainants Exh. 4.

17. In 1994, POMTOC and the County executed the Terminal Operating Agreement, whereby the County granted POMTOC exclusive right to use the 130-acre facility and operate the premises for the benefit of POMTOC members and for the

handling of cargo and related activities (the "Lease"). Section 1.3 of the Lease provides that: "...[POMTOC] shall peaceably and quietly hold and enjoy the Premises for the Term hereby demised without unreasonable hindrance or interruption by Port or any other person or persons lawfully or equitably claiming by, through or under Port, subject nevertheless to the terms and conditions of this Agreement. . . ." Exh. A to Complaint.

18. Article 2.1 of the Lease controls the use of the terminal land, stating: "the operator and its members shall use the premises for the purpose of handling cargo and all related activities." Under Article VI, the members guarantee (proportionally) all of POMTOC's obligations under the Lease. The members signed the Lease as signatory guarantors. *Id.*

### C. POMTOC's and Members' Investments in the Facility

19. In addition to contributing their existing assets to POMTOC at its inception, from time to time, POMTOC members have made additional investments and capital injections into POMTOC, and have at times guaranteed POMTOC's borrowing. If POMTOC has an operating shortfall, the members may be subject to additional capital calls. Respondents Exh. 1 at ¶ 18.

20. POMTOC has made substantial investments in the Terminal. The following illustrates the types of such investments: (i) a new highly automated gate facility that allows for the unmanned processing of trucks and containers, at an original cost to POMTOC of over $3.5 million; (ii) a new terminal operating system called TideWorks (which is based on a terminal wide wireless data network and handheld computer terminals used by both stevedoring and terminal employees, and includes IT hardware, cameras, scanners and a terminal-wide network of below-ground fiber optics,

and installation of towers for wireless communications and other purpose), which allows for the management of gate, yard, vessel, documentation, Customs clearance, and other functions in real time, at an original cost of POMTOC of over $3 million. These two types of investments alone provides for real-time coordination and direction between POMTOC member stevedores and POMTOC itself (via wireless handheld computers) regarding where and when containers should be moved and stored; and (iii) the construction of secure facilities for the housing and protection of IT systems and installation of other manufactured office buildings, at an original cost to POMTOC of approximately $454,000. Respondents Exh. 1 at ¶ 23.

21. Over the past three years, POMTOC has invested over three million dollars to acquire six top loaders (at a rate of approximately two per year). Additional sums are invested every month in maintaining the operations of the facility, including $50,000-$60,000 for software service related to the TideWorks terminal operating system. *Id.* at ¶ 24.

**D. Jurisdictional Issues**

22. Generally, prior to the formation of POMTOC, the four founding stevedoring companies each leased and operated its own discrete marine terminal in the Port of Miami. In each of their terminals, they provided marine terminal services and stevedoring services within their own facilities. None of the facilities were open to the public. *Id.* at ¶ 14.

23. Continental, prior to incorporating POMTOC, provided both marine terminal and stevedoring services at the Port on a smaller facility under a lease agreement with the Port, and had its tariff rates published with Glenserve. After POMTOC's

creation, Continental transferred the terminaling functions to POMTOC, but Glenserve continued for some time to publish Continental's tariff rates. Continental believes Glenserve ceased publishing the rates because Continental stopped paying Glenserve for such publication. Complainants Exh. 216 at p. 8-9 (Supplemental Response to Request 28).

24. Continental continued to provide stevedoring services until the creation of Eller-ITO. Once Eller-ITO was established, Continental's stevedoring functions were transferred to Eller-ITO, and Continental became solely a holding company, which it remains to this day. Respondents' Proposed Findings of Fact ("PFF") at ¶ 4; Respondents Exh. 1 at ¶ 14.

25. Since POMTOC's creation, Continental has not been engaged in the business of furnishing wharfage, dockage, warehouse, or other terminal facilities in connection with common carrier or water carriers. Continental does not own, lease, or otherwise furnish terminal space or other facilities in the Port of Miami. Respondents Exh. 1 at ¶¶ 15-16.

26. Prior to the formation of POMTOC, FSI, like Continental, provided both marine terminal and stevedoring services at the Port on a smaller facility under a privately leased agreement with the Port. After POMTOC's creation, FSI no longer provided marine terminal services, which function was transferred to POMTOC. FSI has never been engaged in furnishing wharfage, dockage, or warehousing. It has continued to providing stevedoring services at the POMTOC facility, at the Port of Miami, and Port Everglades. Respondents Exh. 2 at ¶¶ 11-12; Respondents MTD, Declaration of Jorge Rovirosa at ¶¶ 2-3.

27. Pursuant to contracts with its customers, such as ocean carriers and shippers, FSI provides stevedoring and freight handling services at the Port of Miami. FSI's charges for such services are established by negotiated agreements. *Id.* at ¶ 2.

28. FSI uses terminal facilities operated by POMTOC and warehouse space owned and controlled by the Port to perform stevedoring and freight handling of cargo for its customers. FSI does not own, lease, or otherwise furnish terminal space or facilities in the Port of Miami-Dade, other than small office/administrative and equipment storage spaces. FSI leases small amounts of enclosed space from the Port for office and administrative functions, and to store equipment. All cargo handling is performed in space furnished and controlled by POMTOC or the Port. *Id.* at ¶ 3; Respondents Exh. 2 at ¶ 13.

29. From time to time, FSI has provided freight handling services for cargo interests, including the loading and unloading of freight, the loading and unloading of full containers, and the loading and unloading of cargo to and from containers and other specialized equipment. The services are provided within warehouses owned by the Port, in space controlled by the Port (*i.e.*, space in Shed B that is not leased to any party), or POMTOC. Specifically, container stuffing and unstuffing and consolidating and deconsolidating cargo is done within Shed B; other services are performed at POMTOC and Shed B. Charges for the facility are assessed directly by Port (not FSI) on cargo interests in the form of wharfage, demurrage or storage charges per the Port's tariff. Complainants Exh. 211 at pp. 15-16 (Responses to Requests 23-25); Complainants Exh. 215 at pp. 5-6 (Response to Request 25-a).

30. Ports America Florida acquired its 50% POMTOC interest in two stages as follows: (i) in 2000, P&O Holdings Inc., a Delaware corporation, acquired International Terminal Operating Company ("ITO"), which was renamed P&O Ports North America, Inc. ITO, *inter alia*, owned ITO Corporation, a Louisiana corporation, which in turn owned ITO Corporation of Florida, a Florida corporation. ITO Corporation was renamed P&O Ports Gulfport, Inc. and ITO Corporation of Florida was renamed P&O Ports Florida, Inc. At the time of the ITO acquisition by P&O, ITO Corporation of Florida owned a 25% interest in POMTOC, which it had acquired from SEL in 1995. This interest continued to be owned by P&O Ports Florida, Inc.; and (ii) in April 2003, Ports America Florida purchased the 25% interest in POMTOC that was owned by Oceanic. PFF ¶¶ 7 and 12.

**E. Timeline of Facts Leading to the Complaint**

31. On June 21, 2005, ROW sent the first formal or written communication from Ceres on the issue of stevedoring at POMTOC. In the letter, ROW claimed that it would be nominated as stevedore for Hapag-Lloyd and NYK Line vessels of the South America service that called at the Port of Miami. FSI (the incumbent stevedore) was not given any notice that such a change was contemplated. Respondents Exh. 12 at ¶ 57; Complainants Exh. 62.

32. Following receipt of ROW's June 21, 2005 letter, POMTOC's board considered ROW's unique and unusual demands. Respondents Exh. 12 at ¶ 59; Complainants Exh. 148.

33. On August 18, 2005, while POMTOC's Board was still considering ROW's requests, Ceres submitted a lengthy letter from its counsel, Goodwin Proctor

LLP, alleging multiple violations of the Shipping Act and antitrust laws. In this letter, Ceres also threatened litigation (the subject of the Complaint in this case) if ROW was not given immediately access to the POMTOC terminal to serve Hapag-Lloyd and NYK Line South America service vessels. At that time, Respondents decided to hire specialized maritime regulatory counsel for assistance and advice regarding Ceres' demands. Respondents Exh. 12 at ¶¶ 60-61; Exh. E to Complaint.

34. Respondents' regulatory counsel met with Ceres and its counsel on November 3, 2005, to clarify exactly which of Respondents assets, such as the leased land, data networks, software and other systems and equipment, Ceres wished to utilize, and how. Given that Ceres wished to utilize Respondents' leased terminal and other assets, Respondents, and their counsel, assumed that Ceres wished to make a business proposal for use of Respondents' business assets and suggested commercial negotiations would be in order. None of this had been spelled out previously in Ceres' counsel's letter, or in the one-page June 2005 ROW letter, or in any of the brief instances Ceres employees may have mentioned stevedoring orally to Respondents' personnel. Respondents Exh. 12 at ¶ 61.

35. Ceres, in writing and through counsel, rejected the concept of any commercial negotiation out of hand. With Ceres counsel's letter of November 15, 2005, Ceres' position was clarified, *i.e.*, Ceres was demanding that it utilize Respondents' assets essentially for free, offering only to pay "out-of-pocket costs," such as those associated with connecting Ceres to POMTOC's electronic terminal operating system. *Id.* at ¶ 62; Exh. F to the Complaint.

## F. POMTOC's Response to Ceres' Demands

36. In a letter dated November 30, 2005, from Respondents' counsel in response to Ceres' November letter, Respondents indicated to Ceres that the terms it was proposing were commercially unacceptable. This letter also invited Ceres to put forth a proposal for membership in POMTOC, which would have provided Ceres the rights to stevedore in the terminal. Respondents Exh. 12 at ¶¶ 63-64; Exh. G to Complaint.

37. In November 2005, after consideration of demands made by Complainants that ROW be granted access to POMTOC facilities, POMTOC rejected those demands as they had been formulated and understood to that point. POMTOC believed it to be commercially unacceptable to accede to Complainants' demand that ROW be allowed access to use the POMTOC private facility on an "out-of-pocket cost" basis without bearing any of the investment, commitment and potential liabilities that the POMTOC and its members have shouldered in developing and operating the terminal. Respondents Exh. 1 at ¶ 21.

38. POMTOC has never rejected additional negotiations regarding cooperation with Ceres on terms which benefit both commercial parties (rather than just Complainants). Specifically, POMTOC has made clear that it has been open to receiving a commercially viable proposal to allow Complainants to utilize POMTOC's facilities and assets, and also made clear that it would consider a proposal for POMTOC membership from Complainants. However, Complainants did not, and have not, made any offers to invest in or take a membership stake in POMTOC. *Id.* at ¶ 22.

## G. Leasing a Terminal as Precondition to Stevedore at the Port

39. The Port of Miami is a landlord port; that is, it leases all its terminals out to private operators, which operate and control the use of those facilities. Stevedores have always needed a leased terminal in order to operate as a stevedore of containerized cargo. There is no County-operated container yard facility open to the public. PFF ¶ 13.

## H. Access to the POMTOC Facility

40. FSI and Eller-ITO have had access to the POMTOC facility to perform stevedoring services during the period from January 1, 1999 to the present. Oceanic had access to POMTOC terminal and performed stevedoring at POMTOC from January 1999 to December 2003, including during a brief transitional period while being sold to Ports America Florida. Complainants Exh. 211 at p. 12 (Response to Requests 14.a-e).

41. From approximately 2001 to 2004, POMTOC and the adjoining terminal operator, APM Terminals (*f/k/a* Universal Maritime Services), handled cargo for a vessel sharing alliance that included vessels operated by Maersk Line (APM Terminals' parent company) and a POMTOC customer carrier. Because the carriers were sharing space on the vessels, some of the cargo loaded on each vessel came from POMTOC's container yard, and some came from APM Terminals' container yard. Accordingly, to address this unique operational issue involving both neighboring terminals, cargo was shifted between the terminals through a back gate so that Maersk cargo could be loaded on non-Maersk vessels, and vice-versa. For Maersk cargo being loaded on non-Maersk vessels, APM Terminals would move the cargo through the gate into the POMTOC terminal (subject to a fixed fee of $15 per container), where it would be loaded onboard the vessel by a POMTOC member or member-owned stevedore. For non-Maersk cargo loaded aboard

Maersk vessels, APM would move cargo from POMTOC's side of the fence back to the Maersk terminal, for loading on Maersk vessels. The arrangement was terminated by POMTOC in 2004 after it concluded that (notwithstanding the fees negotiated with and assessed on APM) it was not in POMTOC's business interest to continue allowing APM to enter POMTOC's terminal in this manner, because, among other things, POMTOC incurred in additional costs and was subject to unacceptable claims for cargo loss. At no time did APM ever assert that is had any enforceable "right" to enter POMTOC's terminal. *Id.*; Complainants Exh. 215 at pp. 4-5 (Response to Request 4.e).

42. POMTOC has not assessed a charge against FSI or Eller-ITO (or Eller-ITO's owner(s)) relating to access to the POMTOC terminal for purposes of moving container(s) between a vessel and a point of rest within the terminal. Similarly, FSI and/or Eller-ITO do not pay (or have not paid) any fee to POMTOC for the ability to access POMTOC's terminal operating data system (such as the Spinnaker system) in connection with their stevedoring of vessels using POMTOC for terminal services. FSI and the owners of Eller-ITO, Continental and Ports America Florida, own POMTOC, and have directly or indirectly provided the funding and resources used to acquire and develop POMTOC's terminal and operating systems. The members of POMTOC have contributed substantial capital and guarantees, and provided for the reinvestment of their POMTOC revenues in the acquisition, maintenance, development and improvement of the technologically sophisticated terminal operating system, so that their own stevedoring and POMTOC's terminal operations could proceed in an efficient manner in the POMTOC facility. Complainants Exh. 218 at p. 4 (Response to Interrogatory 4).

43. POMTOC, in accordance with its own commercial interest, allows truckers to have access to the POMTOC facility. POMTOC has made a commercial decision not to charge any trucking company for access to the facility to transport a container, whether loaded or empty, between (from or to) a place outside the facility and a point of rest within the facility. Gate charges are assessed on cargo entering the terminal and invoiced to the shipping lines pursuant to the terms of POMTOC's tariff, and not on truckers. Complainants Exh. 211 at p. 14 (Responses to Requests 18-19).

44. In or about September 2008, POMTOC and South Florida Container Terminal LLC ("SFCT"), which now operates the terminal previously operated by APM, developed a commercially acceptable arrangement, in which POMTOC members and SFCT reciprocally can have access to each others facilities, under certain limited circumstances, in order to manage operational issues presented by a vessel-sharing arrangement that loads and discharges cargo to and from both terminals simultaneously. This agreement is the result of the French shipping line CMA-CGM shifting its operations from POMTOC to SFCT, with SFCT providing its stevedoring as well. CMA-CGM's vessel-sharing partners' vessels Evergreen Marine Corp. and China Shipping Container Lines continue to send cargo through POMTOC, with stevedoring handled by FSI and Eller-ITO respectively. Because of the division of the vessel sharing partners' operations between the two adjacent terminals, the carriers, stevedores and terminals have had to adopt procedures whereby cargo from each ship would be discharged and loaded to the proper terminal, depending on which carrier's cargo it is. In order to accommodate this change (where vessel sharing partners utilize different terminals for a single string), when CMA-CGM vessels arrive, SFCT will discharge and

load CMA-CGM boxes to and from the SFCT terminals, and load and discharge Evergreen and China Shipping boxes to and from POMTOC. Reciprocally, China Shipping and Evergreen vessels carrying CMA-CGM cargo are stevedored by Eller-ITO or FSI, which will discharge and load CMA-CGM boxes to and from the SFCT terminals, and load and discharge Evergreen and China Shipping boxes to and from POMTOC. The number of ships and cargo between CMA-CGM, in one side, and China Shipping and Evergreen, on the other side, are roughly the same. This arrangement was undertaken after consultation with the carriers regarding what the safest and most efficient operational solution would be for handling this relatively unique service utilizing two terminals. Complainants Exh. 218 at p. 3 (Response to Interrogatory 4); Respondents Exh. 13 ¶¶ 10-11.

## I. Harm to POMTOC

45. The costs that POMTOC would accrue if ROW were to stevedore at the POMTOC terminal without reasonable compensation could include, but are not limited to, costs that are clerical, administrative, costs associated with IT hardware, software and systems, costs related to disruption or delay of existing operations, costs related to risk management, accounting and legal costs, and costs relating to lost business and lost stevedoring revenues of POMTOC members, which have not yet been quantified. Complainants Exh. 215 at p. 5 (Response to Request 21).

46. The fair market value of POMTOC itself would be harmed by allowing outside parties access to the POMTOC terminal without reasonable compensation, since POMTOC is a limited liability company made up of three members, each of whom relies on revenue from stevedoring operations at POMTOC. The POMTOC members (or

predecessor companies) operated individual terminals in Miami before POMTOC's formation, and entered into the POMTOC venture upon its inception, so they could continue to have a viable terminal in which they could stevedore. These member companies established POMTOC, co-signed its lease with the county, and authorized and guaranteed POMTOC's borrowing and development all with the expectation that they would be allowed to use this property for their own business purposes, and that the property rights in POMTOC's land and other assets would be respected. Negating these property rights would destroy much of the market value of POMTOC to its owner members. Respondents Exh. 14 at ¶¶ 7-8, 14-15.

**J. Ceres Had Other Options to Operate at the Port**

47. Because the cranes and wharves in Miami are controlled by the County, Ceres/ROW could have performed stevedoring services at the Port without entering any of the POMTOC, APM (now SFCT) or Seaboard terminals. Ceres could have stevedored boxes from its customers' ships to a point of rest on the wharf, adjacent to a privately leased terminal. From there, a terminal operator could retrieve the boxes and bring them into the leased facility (as Ports America Florida reportedly does for a third-party stevedoring at its terminal in Tampa), or drayage truckers could bring them to an off-dock yard (as happens occasionally with breakbulk cargoes in Miami). For instance, Bernuth Lines, Ltd. loads and unloads containers on its vessels at the berth adjacent to MacArthur Causeway directly across the channel from the APM Terminals facility. Also, FSI (in serving Great Western Lines) has loaded and/or unloaded empty containers, RO/RO cargo, and heavy lift cargo directly from the stringpiece adjacent to the POMTOC terminal, without placing the cargo in the terminal itself. Respondents Exh. 1

at ¶ 30; Complainants Exh. 211 at pp. 28-29 (Response to Request 57); Respondents Exh. 13 at ¶ 6.

48. POMTOC is not the only marine terminal providing service for containerized cargo in the Port of Miami. There are two other container terminals that are adjacent to the POMTOC terminal: (i) the terminals operated by SFCT, which is a joint venture of Terminal Link (Miami), a subsidiary company of French shipping CMA CGM Group, and APM Terminals North America; and (ii) the terminal operated by Seaboard. APM and SFCT have competed, and continue to compete, with POMTOC. Respondents Exh. 1 at ¶¶ 28-29.

49. Also, the Port of Miami and Port Everglades compete vigorously for cargo and carrier services. Frequently, when carriers are considering serving the South Florida area, they will solicit competitive proposals from both POMTOC and from one or more terminals in Port Everglades (such as Florida International Terminal). It is not uncommon for carriers to move their port calls from Miami to Port Everglades, or from Port Everglades to Miami, in order to secure a cost advantage. *Id.* at ¶ 29.

50. Complainants could also have pursued membership in POMTOC, an option that ROW declined in the 1990's and which Ceres has remained unwilling to even discuss. PFF ¶¶ 36, 38; Respondents Exh. 11 at 54:20-55:15. *See also,* Respondents Exh. 11, Exh. 45 to the deposition transcript at 7:25-8:5; Respondents Exh. 11 at 11:6-12:6.

### K. POMTOC Does Not Control Whether and Where Ceres Loads and Unloads Vessels in the Port of Miami or Other Nearby Facilities

51. POMTOC has no control over whether Complainants load and unload vessels in the Port of Miami or other nearby facilities. POMTOC does not lease, and has

no control over, the Port's channels, berths, wharves, apron (*i.e.*, the quay area immediately adjacent to the water), container cranes, or the public roadways into and around the Port. POMTOC can only control access to its privately leased container yard facility, and whether Complainants are allowed to access and use POMTOC's proprietary information technology systems to determine where and how cargo should be moved and stored. POMTOC has no control over or involvement in whether Complainants lease or contract to use space elsewhere in or around the Port of Miami to conduct their operations. Respondents Exh. 1 at ¶ 30.

## III. ARGUMENT

### A. Unreasonable Refusal to Deal

The record in this docket shows that Ceres made a single, one-sided, and unrealistic demand to Respondents, for cost-free use of Respondents' real property and technology systems. Respondents carefully considered the demand, asked for more information, invited commercial negotiations and proposed other approaches, which Ceres declined to pursue. Respondents have never refused to deal or negotiate in good faith with Ceres.

#### 1. The FMC's Test for Unreasonable Refusals to Deal

The Shipping Act states that a marine terminal operator ("MTO") may not unreasonably refuse to deal or negotiate. 46 U.S.C. § 41106(3) (former Sections 10(b)(10) and 10(d)(3)). The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms. All that is required is that MTOs "refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-

related factors." *New Orleans Stevedoring Co. v. Bd. of Comm'rs of the Port of New Orleans*, 29 S.R.R. 345, 351 (2001), *aff'd*, 29 S.R.R. 1066, 1070 (2002).

Cases assessing claimed refusals to deal are heavily fact-driven and adjudicated on a case-by-case basis. In some cases, the Commission has found that there was no refusal to deal. For instance, in *Chilean Nitrate Sales Corp. v. San Diego Unified Port Dist.*, 24 S.R.R. 1314 (1988), the complainant alleged that the respondent port refused to deal or negotiate when it converted a cargo handling space the complainant was leasing into a different type of cargo handling facility. The Commission found that the complainant had not attempted to negotiate a lease for space in the new facility and, therefore, that there was no refusal to deal. In other cases, the Commission has found that a refusal to negotiate further was not unreasonable. In *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886 (1993), Seacon alleged that the Port of Seattle unlawfully had excluded it from the port by refusing to deal and negotiate a new lease. However, the Commission found that the port had negotiated with Seacon for over a year, and because no new lease was signed with Seacon, the port's negotiation and eventual agreement for a lease with another company was a reasonable exercise of its business discretion. *Id.* at 899.

Only when a terminal operator is shown to have refused to negotiate or consider a *bona fide* offer from an offeror without justification has the Commission found a violation. *See Canaveral Port Auth. – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436 (2003), where the Commission found an unreasonable refusal to deal where the Port, without good cause, expressly refused to even consider a second application submitted by a tug company for a

tug franchise, an application submitted some years after the rejection of a first application. That is not the case here.

### 2. Respondents Dealt in Good Faith with Ceres, but Ceres Refused POMTOC's Offers of Negotiation

The record is clear that Respondents gave close and careful consideration to Ceres' proposal, discussing it at Board meetings and retaining two separate law firms with maritime regulatory experience to assist in analyzing Ceres' demands. *See, e.g.*, PFF ¶¶ 32-33; Complainants Exhibits 104, 105, 148 and 151 (p. 2). *See, also*, Respondents Exh. 12 at ¶¶ 59-61. Respondents directed their regulatory counsel to meet with Ceres' counsel and request additional information and details about Ceres' position and proposal. In that meeting, POMTOC suggested, through counsel, that commercial negotiations would be appropriate. PFF ¶ 34-35.

Ceres' follow-up response, in writing through its counsel, shows that Ceres, not POMTOC, was unwilling to participate in any commercially-based negotiation or dealings before initiating litigation:

> You stated that POMTOC is unclear as to whether ROW would move containers between the NYK/Hapag vessels and a place of rest on the POMTOC terminal. As specifically stated in ROW's June 21st letter, POMTOC will continue to function as the marine terminal operator for the NYK/Hapag ships. Necessarily, then, ROW will move containers between the ships and a point of rest on POMTOC's terminal, as the June 21st letter identifies.
>
> Contrary to POMTOC's position as you conveyed it, this fact does not require or warrant a complex commercial negotiation between ROW and POMTOC before ROW can stevedore the NYK/Hapag vessels. ROW is entitled to commence this function immediately (and should have been allowed to do so months ago).
>
> * * *
>
> The foregoing is not to say that ROW has completely ruled out the possibility of making some form of payment to POMTOC in connection with its stevedoring of the NYK/Hapag ships. Although not legally

> required, in the interest of resolving this matter ROW would be willing to talk with POMTOC about reimbursing *bona fide*, additional out-of-pocket costs (if any) that POMTOC incurs as a direct result of ROW's performance of such stevedoring, such as the cost (if any) of software modifications necessary to allow ROW to input and retrieve data from the Spinnaker system, as described in ROW 's June 21 letter. However, this would be in the nature of a technical accounting rather than a major commercial negotiation.

Exh. F to the Complaint at pp. 2-3. (Emphasis added).

It was plain on the face of this response that Ceres had no interest in negotiating a mutually beneficial commercial arrangement. Rather, Ceres was, and is, intractably wedded to its position that it is entitled to impose a cost-free easement and license to enter and utilize POMTOC's real property and computer systems for Ceres' benefit.

Respondents rightly viewed the proposal set forth by Ceres' counsel as profoundly one-sided and uncommercial, for the reasons detailed in the testimony of Mr. Rovirosa and Mr. Edwards. *See* Respondents Exh. 12 at ¶¶ 18-22; Respondents Exh. 14 at ¶¶ 5-8. *See also*, PFF ¶¶ 37, 45-46. Ceres' proposal was crafted to secure a cost-free windfall for Ceres, affording ROW the use of highly advanced and valuable marine terminal facilities and technology systems for virtually no cost, no risk, and no commitment. Ceres' proposal offered no commercial benefits (indeed, only lost stevedoring business) for Respondents, who have committed years of hard work, lease payments, investments and development to creating such a modern and efficient facility, as detailed in the testimony of Mr. Rovirosa, Mr. Edwards, and Mr. Ballestero. *See* Respondents Exh. 12 at ¶¶ 28-29; Respondents Exh. 14 at ¶¶ 14-15; Respondents Exh. 13 at ¶ 12.

Even faced with Ceres' legal threats and commercially lopsided demands, POMTOC still held the door open to Ceres to negotiate. POMTOC, in writing, invited

Ceres to submit an application for POMTOC membership. *See* Exh. G to the Complaint at p. 2. Ceres never availed itself of that offer, as it was only interested in free use of the terminal. (Mr. Simmers would later testify "[a]ddressing POMTOC's suggestion that Ceres/ROW should be made to buy a share of POMTOC in order to be eligible to stevedore cargo for vessels calling POMTOC, I have never understood why that makes any sense at all.") Mr. Simmers' Direct Testimony at ¶ 70.

Ceres has, at various points in the record, cryptically asserted that the POMTOC membership provisions are designed to exclude new members. *See, e.g.*, Mr. Simmers' Direct Testimony at ¶ 71. These theoretical assertions appear manufactured to effect a *post hoc* justification of Ceres' unwillingness to even discuss or consider investing in POMTOC and taking a membership stake. However, the theoretical issue of how POMTOC's new member process would have been administered – if Ceres had been willing to pursue it – is entirely irrelevant to this case. Ceres has not challenged the lawfulness of the new membership requirements in its complaint in this docket. Ceres never indicated a willingness to consider or pursue POMTOC membership, despite a direct invitation from POMTOC to do so. Mr. Simmers' testimony clearly shows that he was not interested in POMTOC membership, as he believed that Ceres should not have to become a POMTOC member to enter and use the terminal. *Id.* at ¶¶ 13 and 70.

### 3. Ceres' Alleged Conversations With Respondents in Early 2005 Do Not Evidence a Refusal To Deal

Ceres points to hearsay characterizations of earlier conversations with former employees of Respondents to bolster its refusal to deal claims. These efforts have no merit.

Paragraphs 34-41 of Mr. Simmers' Direct Testimony provide short and vague accounts of conversations Mr. Simmers claims to have had with various former employees of Respondents about Ceres' hypothetical interest in utilizing the POMTOC terminal, if and when Ceres obtained a stevedoring license to operate in Miami. These conversations (none of which evidence any refusal or unwillingness to negotiate or deal) took place before Ceres acquired ROW.

In Mr. Simmers' Direct Testimony at Paragraph 34, he asserts that Art Novacek "rejected" his request for support in gaining confirmation of Ceres' ability to stevedore the NYK service. Several points are worth noting in connection with Mr. Simmers' accounts of his dealings with Mr. Novacek. First, Mr. Novacek is deceased, so we cannot access his account of any of the conversations Mr. Simmers alleges. Second, Mr. Simmers' characterization of his conversations is exceedingly vague and subjective only stating that he felt "rejected," but recounting none of the actual substance of the conversation recounted. Third, it was not within the scope of Mr. Novacek's responsibilities, as one Board member from a minority stakeholder of POMTOC, to accept or decline commercial offers directed at POMTOC.

In Mr. Simmers' Direct Testimony at Paragraph 37, he sets out a paragraph of an e-mail he sent to then-POMTOC manager Chris Morton in which Mr. Simmers claims Mr. Morton refused to permit Ceres to perform stevedoring utilizing POMTOC's terminal under the then-hypothetical scenario that Ceres obtained a stevedoring license. (This exchange took place before Ceres acquired ROW, and thus gained use of a stevedoring license.) Mr. Simmers gratuitously omitted in his testimony that Mr. Morton immediately wrote back and disputed the accuracy of Mr. Simmers' account. *See*

Complainants Exh. 61. Accordingly, no weight should be given to Mr. Simmers' incomplete and misleading account of his disputed exchange with Mr. Morton.

In Paragraph 41 of Mr. Simmers' Direct Testimony, he recounts a conversation or conversations he claimed occurred with three POMTOC Board members, Mr. Novacek, Mr. Rovirosa, and Mr. Scavone. While it is unclear from the record whether such conversation(s) occurred, even Mr. Simmers' self-serving summary shows there was no refusal to deal; only a general uncertainty about Mr. Simmers' legal claims and demands, and a need for more consideration by the commercial parties involved.

In Paragraphs 41, 51 and 57-58 of Mr. Simmers' Direct Testimony, Mr. Simmers claimed that Mr. Scavone orally indicated that Ceres would not be allowed to stevedore cargo for vessel calling at POMTOC. Mr. Scavone's affidavit rebuts this allegation comprehensively, making clear that Mr. Scavone never took the position Mr. Simmers ascribes to him. *See* Respondents Exh. 17 at ¶¶ 4-7. Also, as with Mr. Novacek, it was not within the scope of Mr. Scavone's responsibilities to respond to Mr. Simmers regarding his interest in utilizing the POMTOC property. Accordingly, Mr. Simmers' disputed descriptions of these exchanges are at best unreliable hearsay.

Mr. Scavone's testimony reveals something more basic about the credibility of Mr. Simmers' testimony. It appears that at least some of the conversations that Mr. Simmers characterizes in his testimony as "refusals" did not arise in the context of formal proposals or meetings on his request; rather, they were off-the-cuff inquiries or passing encounters, such as Mr. Simmers bumping into his former colleague Mr. Scavone on an airplane, trying to engage him in a conversation about POMTOC, then seeking to portray the exchange as a refusal to deal. *See id.* at ¶ 5.

After ROW and Ceres' representatives met with POMTOC in late May/early June of 2005, the record shows that POMTOC's Board actively considered the commercial and operational implications of Ceres' position. However, it was clear that Mr. Simmers' demands were ultimately based in his perception that Ceres could demand access and price level disadvantageous to POMTOC, rather than negotiate any mutually advantageous commercial arrangement. *See, e.g.*, Mr. Simmers' Direct Testimony at ¶¶ 10-11, 13. Accordingly, that summer, POMTOC sought legal guidance from its corporate counsel on the complex, novel and esoteric claims of regulatory rights asserted by Mr. Simmers. Apparently aware that Respondents were carefully considering Mr. Simmers legal assertions (and presumably looking to sway that process), Ceres' counsel sent its particularly pointed letter of August 18, 2005 (attached as Exh. E to the Complaint) accusing Respondents of Shipping Act and other legal violations. Faced with the complex, obscure and unprecedented legal claims in the Goodwin Proctor letter, POMTOC retained specialized maritime regulatory counsel, which it previously had not utilized. Over the next two months, a search was conducted, Troutman Sanders LLP and Blank Rome LLP were selected to advise Respondents, retentions were arranged, and the new counsel undertook the process of familiarizing themselves with POMTOC and the details of this dispute. Once that process was complete, they engaged with Ceres counsel to better understand and evaluate their legal and commercial position, as described above. Ceres' characterization of this process as "stonewalling" is entirely baseless and unfounded.

In sum, Respondents carefully considered and declined one commercially unacceptable demand from Complainants. The record does not show that Respondents

"shut out" Complainants or ever refused to deal or negotiate. As noted in Mr. Ballestero's Rebuttal Testimony, POMTOC is, and continually has remained willing to negotiate reasonable, commercial opportunities for commercial collaboration. *See* Respondents Exh. 13 at ¶¶ 9-12; PFF ¶¶ 37-38.

### B. Just and Reasonable Regulations And Practices

The Shipping Act requires that "a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c) (former Section 10(d)(1)). Ceres seems to take the position that Respondents – by declining Ceres unreasonable demand that Ceres be granted a free easement to invade and utilize POMTOC's property and systems – have run afoul of a line of FMC decisions applying a predecessor of § 41102(c).

It is not clear at this point in the briefing specifically which cases Ceres believes afford authority or precedent for its extraordinary position, or how Ceres intends to analogize its current demands to the practices at issue in those dockets. The facts presented by the instant record are entirely unlike any others found by the Commission to be violative of the Shipping Act. In this instance, Complainants has not been denied a license or concession. (Indeed, R.O. White declined POMTOC membership at is inception; then, in 2005 Complainants again were invited to submit a proposal for POMTOC membership, which Complainants declined.) Instead, Ceres is demanding that it be given a free easement to enter and operate on POMTOC' private property, as well as

a compulsory free license to utilize Respondents' data systems, so that Ceres might operate a profitable stevedoring business without incurring the cost or risk of these assets.

Without knowing specifically how Ceres might argue that Respondents have violated § 41102(c),[1] there are a number of points that would preclude any finding of liability by Respondents:

### 1. The Federal Maritime Commission has No Authority to Require Open Access to Marine Terminal Property

The Shipping Act grants the FMC broad authority to proscribe "fail[ures] to establish, observe, and enforce just and reasonable regulations and practices. . . . *Id.* However, it does not vest in the FMC any specific authority to require the operator of a container terminal to permit an outside stevedore to physically intrude upon the terminal and make use of that property (as well as related communications and data systems) for the purposes of conducting stevedoring business.[2] Accordingly, Complainants urge the FMC to hold, for the first time, that the general authority to proscribe unreasonable practices includes a power to mandate that container terminal lessees permit invasions of their property and systems by unrelated stevedores or other members of the public. The Shipping Act cannot bear such an interpretation.

The Commission has never held that the Shipping Act authorizes nonconsensual expropriation of shoreside facilities. Even in its earliest cases addressing selection of

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[1] The simultaneous briefing schedule in this matter requires Respondents to defend without first having seen Ceres arguments. All defenses advanced here are based on suppositions about the expected framing of Complainants' case based on previously filed pleadings.

[2] Compare 49 U.S.C. § 11102, empowering the Surface Transportation Board to mandate access by competitors to terminal facilities in the rail context, and tying computation of compensation payable therefor to the principles employed in the condemnation context. If Congress wished to empower the FMC to require "open access" to private terminal facilities, it would have done so expressly, as it did with the STB.

dry-bulk stevedores in the pre-containerization era, the Commission and its predecessor were careful to emphasize that its regulatory actions were undertaken to foster competition for stevedoring activities taking place onboard ships (*e.g.*, grain trimming), and not activities taking place in shoreside facilities. For example, in *California Stevedore and Ballast Co. v. Stockton Port Dist.*, 1 S.R.R. 563 (1962), the Commission found that all the stevedoring work at issue would take place on the vessel, because "[i]n loading grain the functions of the stevedore begin only after grain leaves the loading spout." Similarly, in *Greater Baton Rouge Port Commission v. U.S.*, 287 F.2d 86, 94 (5th Cir. 1961), the Circuit Court of Appeals explained: "[s]tevedoring is traditionally maritime. . . . There is no physical connection between vessel and elevator except guide lines to hold the spout discharging grain into a hatch. The elevator workers perform no services on the vessel; the longshoremen perform [no] services in the elevator or on the wharf." In the prior administrative case before the FMC, the Commission stressed that it was disapproving the subject agreement based on the fact that it would create "a monopoly over activities which take place exclusively on the vessel and not on terminal property." *Agreements Nos. 8225 and 8225-1*, 5 FMB 648, 656 (1959). Similarly, a long line of FMC exclusive tug franchise cases have dealt with the ability of competitors to operate in the nation's navigable waters, not on privately leased dry land. *See Canaveral Port Auth.*, 29 S.R.R. 1436; *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 28 S.R.R. 751 (1999) (hereinafter "RIVCO"); *Petchem, Inc. v. Federal Maritime Comm'n*, 853 F.2d 958 (D.C. Cir. 1988).

An order by the FMC granting the relief that Ceres seeks – a right to enter POMTOC's terminal to go to and fro at will, and to tap into POMTOC's data systems –

would not only be unprecedented, it would also constitute an unlawful and unconstitutional taking of POMTOC's property rights. The Shipping Act should not be made to bear usurpation of fundamental constitutional protections. *U.S. v. Delaware & Hudson*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.")

The Takings Clause of the Fifth Amendment expressly prohibits the federal government from taking private property for public use without just compensation. The Supreme Court has recognized a broad range of instances where regulatory actions constitute a taking of private property rights; however, the clearest and most extreme cases of such takings involve instances where, as here, the government physically invades, or authorizes third parties to invade, real property. In those "physical invasion" cases, a *per se* rule is applied; no balancing of interests is needed before holding the government liable for the taking. These principles were explained in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), in which the Court invalidated a requirement that a waterfront homeowner allow non-owners to traverse the waterside edge of its property:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest, but rather (as JUSTICE BRENNAN contends) "a mere restriction on its use," post at 483 U. S. 848-849, n.3, is to use words in a manner that deprives them of all their ordinary meaning. . . . Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 433 (1982), quoting *Kaiser Aetna v. U.S.*, 444 U. S.

> 164, 176 (1979). In *Loretto*, we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, *see* 458 U.S. at 432-433, n.9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-435. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

*Id.* at 831-32.

This Takings Clause analysis applies broadly, not just to ownership, but also to leaseholds or lesser possessory property interests. *See, e.g., U.S. v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (holding that the Fifth Amendment protects rights to possess, use and dispose of physical property; to the extent that the government permanently occupies physical property, it effectively destroys each of these rights); *Kirchdorfer v. U.S.*, 6 F.3d 1573 (Fed. Cir. 1993) (even possessory rights in a temporary building on government property are protected property rights under Takings Clause). There is no question that the property rights set forth in POMTOC's lease (in which POMTOC pays rent in exchange for possession, use and quiet enjoyment of the leased property) arise to the status of a constitutionally protectable property rights.

The Supreme Court took a similar approach, using the *per se* test to strike down a regulatory authorization of an invasion of property, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419. In *Loretto*, the Court invalidated a statute that required landlords to allow installation of cable TV companies' cables and equipment on their rental properties without compensation for access to the property. In a lengthy opinion that provides a useful guide to constitutional principles at issue in the instant

docket, the Court held that when the physical intrusion constitutes a permanent physical occupation, a taking has occurred. *Id.* at 441. The Court defended the rationale behind the traditional *per se* rule for finding takings in physical occupation cases, holding that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property" and that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Id.* at 436. In an apt analogy, the Court explained: "Few would disagree that, if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking." *Id.*

Even in cases where the character of the physical invasion has not amounted to a permanent occupation, the Supreme Court (employing the rule of reason set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) has held that a taking has occurred when the government authorized a physical invasion that disrupted the property owners' "investment-backed expectations." *See, e.g., Kaiser Aetna v. U.S.*, 444 U. S. 164 (1979) (federal imposition of a navigational servitude requiring public access to new marina's pond was a taking). In that case, the Supreme Court held that the property owners had relied on their right to exclude the public ("one of the most essential sticks in the bundle of rights that are commonly characterized as property") in developing a marina. *Id.* at 176. The Court explained:

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation.

*Id.* at 180 (emphasis added) (internal citations omitted).

Much like the plaintiffs in *Kaiser Aetna*, POMTOC's members formed POMTOC, and leased and developed the POMTOC terminal with reasonable investment-backed expectations that they would be entitled to quiet enjoyment of the POMTOC property in order to conduct their terminal and stevedoring businesses therein. *See* PFF ¶¶ 45-46; Respondents Exh. 12 at ¶¶ 11-14; Respondents Exh. 14 at ¶¶ 14-15. A federal order requiring that the property be opened to occupation and use by competing stevedoring companies would clearly be unfair and disruptive to Respondents' investment-backed expectations, and would leave the FMC liable to pay the fair market value of the property interests taken.[3]

The Shipping Act must be construed consistently with mandates from both Congress and the Executive Branch that federal agencies are to avoid taking actions that result in constitutionally cognizable takings without formal condemnation proceedings. *See, e.g.*, 42 U.S.C. § 4651(8) ("[n]o Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property") and Executive Order 12630 ("[a]ctions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may

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[3] If the Commission were to afford Ceres the relief it requests -- access to POMTOC's property and systems on the terms Ceres demands – the Commission would be liable to POMTOC for the value of the property interests taken in an inverse condemnation action before the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. In such a proceeding, the FMC would stand liable to Respondents not just for compensation for property, but for Respondents' costs and attorney's fees as well pursuant to 42 U.S.C. § 4654(a) (authorizing costs for unauthorized condemnation actions). Moreover, GAO has suggested that an agency that engages in a taking without acting pursuant to proper authority may be in violation of the Antideficiency Act, 31 U.S.C. § 1341, which prohibits making obligations or expenditures in excess or advance of appropriations. *See Principles of Federal Appropriations Law*, Third Edition, Volume III, United States Government Accountability Office, Sept. 2008, pp. 13-36 and 13-57.

constitute a taking of property"). The FMC has no power of eminent domain or legislative authorization of condemnation power, and thus no authority to engage in constitutionally protected takings. (*Compare* 33 U.S.C. 591-94, authorizing the Army Corps' condemnation power in connection with harbors). Nor has the FMC been authorized by Congress to acquire real property, a prerequisite to general condemnation authority under 40 U.S.C. § 257. Accordingly, the Shipping Act cannot be read to afford the agency power to mandate physical invasions or permanent physical occupations of marine terminals.

### 2. Respondents Have Not Excluded Ceres or Created a Stevedoring Monopoly

Notwithstanding Ceres' attempts to paint Respondents as having created a monopoly over stevedoring and excluded Ceres, the market for container terminals and stevedoring in South Florida is a vigorously competitive one, with several options for container carriers. The record shows that both Ceres and its parent company NYK Lines had ample opportunity to pursue other alternative stevedoring arrangements, and Ceres has no one to blame but itself for its failure to reach agreeable commercial terms with any of the potential marine terminal partners in the market. *See, e.g.*, PFF ¶¶ 47-51.

In this regard, this docket is similar to *All Marine Moorings v. ITO Corp. of Baltimore*, 27 S.R.R. 539 (1996). In that case, All Marine Moorings objected that ITO had reserved the line handling in its own terminal to itself, not allowing All Marine to compete for the work. The ALJ found that ITO had "nowhere near a monopoly"; accordingly, there was no *prima facie* showing of unreasonableness, and no necessity that the practices be justified. (If justification were needed, however, the Commission noted

that the greater the degree of monopoly, the greater the evidentiary burden of justification). *Id.* at 541.

### 3. Ceres was not Excluded by POMTOC

As an initial matter, the record clearly demonstrates that Ceres was not "excluded" from POMTOC – if anything, Ceres excluded itself by clinging to an unreasonably brittle commercial position, offering only payment of "out-of-pocket costs." It declined to submit a proposal for POMTOC membership or enter into commercial negotiations for reasonable terms for use of the POMTOC property and systems before filing its Complaint in this docket. PFF ¶¶ 35, 37-38. As noted in Section III. A above, the record shows that Respondents were willing to enter into negotiations with Ceres for a mutually beneficial commercial arrangement, and invited Ceres to submit a membership proposal. Ceres, instead, adheres to the position that the Shipping Act gives it the right to enter and capitalize on Respondents' property and systems on terms that offer nothing to prospective business partners.

As the Rebuttal Testimony of Mr. Ballestero indicates in Paragraph 6, Respondents Exh. 13, Ceres had numerous other alternatives to offer cargo stevedoring. In addition to POMTOC membership, Ceres had the option of negotiating an arrangement with the terminal next door (previously APM Terminals, now SFCT). The record shows that Ceres on a number of occasions has sought to negotiate a commercial arrangement with that neighboring terminal, but such a deal has not yet come to fruition due to commercial considerations. *See, e.g.*, Mr. Simmers Direct Testimony at ¶¶ 89-100. Moreover, Ceres could stevedore boxes between ships and a point on the wharf (which is controlled by the Port, not POMTOC) immediately adjacent to the

POMTOC or SFCT leased terminals. As Mr. Ballestero notes, Ports America Florida has a similar arrangement with an unaffiliated terminal operator in Tampa. PFF ¶ 47; Respondents Exh. 13 at ¶ 6. Ceres has never explained on the record of this docket why it believes it has to, or is entitled to, enter POMTOC's leased property as a prerequisite to stevedoring vessels in Miami.

Ceres had other options for cargo it stevedores, including draying boxes off the wharf to an off-dock facility, leasing other land in or around the Port of Miami, leasing available terminal land in one of the Port Everglades terminals (which the record shows are in the Miami Metropolitan Statistical Area, and are part of the unitary "South Florida" terminal market in the eyes of carriers), or negotiating some commercial arrangement for terminal access with one of the Port Everglades facilities. *See, id.* It is clear from the direct testimony of Mr. Simmers and Mr. Cashon, as well as Ceres' final round of discovery responses, that Ceres has considered a number of commercial and operational arrangements, but has not consummated any, apparently due to commercial considerations. It is clear, however, that access to POMTOC's facility is only one of many possible commercial options for Ceres to operate a cargo stevedoring operation in South Florida. Mr. Simmers Direct Testimony at ¶¶ 77-78, 89-100; Mr. Cashon Direct Testimony at ¶ 30; Respondents Exh. 5 at pp. 2-4. By attempting to dragoon POMTOC into an extremely unfavorable commercial arrangement using legal threats and the application of the Commission's process to the negotiating environment, Ceres apparently finds other arrangements considerably less advantageous than one where it can force entry at out-of-pocket costs, while also claiming entitlement to reimbursement

of its attorneys' fees. It is understandable that alternatives might appear economically less favorable.

#### 4. Respondents have not Created a Monopoly in the Relevant Stevedoring Market

The Commission has noted that:

> To analyze whether an exclusive arrangement is *prima facie* unreasonable under the 1984 Act, the Commission must first determine the market relevant to the practice in question, and then must determine the degree of actual harm or harm likely to be caused by the practice within that market.

*RIVCO,* 28 S.R.R. at 766-67 (footnotes omitted).

In the record, there is ample evidence that the relevant market for stevedoring services is the metropolitan Miami region, generally referred to as "South Florida," which encompasses the terminals at the Port of Miami and, across the county line, the terminals at Port Everglades. Testimony from both Complainants and Respondents confirm that the Miami and Port Everglades terminals compete actively for carrier business. *See, e.g.*, Respondents Exh. 1 at ¶¶ 26-27; Respondents Exh. 13 at ¶ 6; Respondents Exh. 5 at pp. 2-4. Likely, the best evidence of this competition is in the testimony of Steve Gallaway of Hapag Lloyd, who was responsible for the selection of stevedores and terminal operators for Hapag Lloyd, NYK, and other Grand Alliance members in South Florida. He described in detail how he would have terminals and stevedores in the Port of Miami and Port Everglades (including Florida International Terminals and Port Everglades Terminal) compete against each other, and would switch carrier services from one facility to another. *See, e.g.*, Respondents Exh. 8 at 34:24-35:23, 77:10-82:22, 90:25-91:20; Respondents Exh. 8-A at 155:17-163:18.

The record shows that carriers serving South Florida enjoy a number of competitive choices for stevedoring and terminal operations. Within POMTOC itself, carriers can choose between FSI and Eller-ITO. These two companies compete vigorously against each other for business. *See* Respondents Exh. 12 at ¶ 45 and Respondents Exh. 16 at ¶ 11. Within the Port of Miami, the testimony of Mark Baker shows that APM Terminals and (subsequently) SFCT have competed and are currently competing for stevedoring and terminal business. *See* Written Statement of Mark Baker, attached as exhibit to the Port's Rebuttal Evidence, at ¶¶ 6-21. Moreover, as noted above, the testimony of Mr. Gallaway and others show vigorous head-to-head competition with Florida International Terminals and Port Everglades Terminal, and other major local container terminals. His testimony reveals a vigorous and exceptionally competitive local market for stevedoring in which carriers exercise both free choice and the upper hand in dealing with competing terminals and stevedores, rather than a restrictive or monopolistic market. *See, e.g.*, Respondents Exh. 8-A at 121:17-122:7, 176:4-177:11.

The facts of this market are completely unlike the extraordinarily narrow relevant market described by the Commission in its investigation into tug practices in the Lower Mississippi River. *Exclusive Tug Franchises-Marine Terminal Operators Serving the Lower Mississippi River*, 2001 WL 1420468 (FMC 2001). In that case, the Commission defined the relevant market as each individual terminal, noting that shipowners have no ability to select or switch terminals. (With the shipment of bulk grain, the vessel necessarily must call at the terminal of the seller of the grain.) *Id.* at *7.

### C. Respondents Have Not Discriminated Against Complainants

The Shipping Act requires that a marine terminal operator not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2). The Commission has described the factors of an unreasonable discrimination claim as follows:

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. . . . The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

*Ceres Marine Terminals, Inc v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (1997) (footnote omitted).

Complainants appear to take the position that they have been discriminated against, but at this stage in the briefing, it is not clear how such an argument would be framed. Clearly, Complainants wish to physically enter and utilize facilities leased and developed by Respondents. However, Complainants are not similarly situated to FSI, Ports America Florida or Continental. Complainants have been unwilling to invest in the leasing or development of marine terminal ventures in the Port, while Respondents have invested in and developed POMTOC specifically to afford themselves the facilities needed to carry out their businesses. Accordingly, Ceres is not seeking parity with the POMTOC member companies; rather, it is looking to be afforded a remarkable advantage over them, *i.e.*, the right to utilize a modern and sophisticated container terminal without having to bargain or pay fair market value for those rights. Such a fact pattern is a poor fit for the FMC's discrimination analysis. In terminal cases such as *Ceres v. MPA* and

*Seacon*, 26 S.R.R. at 900, where the FMC has found unreasonable discrimination, the case has centered on whether one operator has been afforded significantly more favorable commercial terms (generally by a port) than another similarly situated operator. However, in this case, Respondents are simply utilizing the assets that they collectively developed, exercising their discretion to decline one particularly inadequate offer for the use of those assets, and relying on their bargained-for property rights of quiet enjoyment to continue to use the terminal in the manner agreed to in the Lease.

### D. The FMC Lacks Jurisdiction Over POMTOC Members

Complainants allege that POMTOC members have violated various sections of Sections 5 and 10 of the Shipping Act applicable to marine terminal operators ("MTOs"). However, Continental, Ports America, Port America Florida, and FSI are not MTOs as defined in Section 3(14) of the Shipping Act and the Commission's rules. They do not own, lease, or otherwise furnish to any customers any wharves, docks, warehouses or other terminal facilities in the Port. Further, Complainants have not met their burden of showing that jurisdiction exists with respect to the POMTOC members. These Respondents are not regulated by the Commission and, thus, are not properly named in the Complaint.

#### 1. POMTOC Members Are Not Marine Terminal Operators

Complainants have the burden of establishing jurisdiction over POMTOC members. *See, e.g., Gaar v. Quirk*, 86 F.3d 451, 453 (5th Cir. 1996) (court has duty to raise issue of jurisdiction *sua sponte* and complaining party has burden of establishing jurisdiction); *Aetna Casualty & Surety Co. et al. v. Hillman, et al.*, 796 F.2d 770, 775 (5th

Cir. 1986) (party invoking court's jurisdiction has the burden of proving that jurisdiction exists).[4] Complainants have not met that burden.

Section 3(14) of the Act, 46 U.S.C. § 40102 (14), provides a straightforward test that a "marine terminal operator" is a person engaged "in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49, United States Code." The Commission's rules elaborate on this definition – 46 C.F.R. § 525.1(c)(13) states:

> Marine terminal operator means a person engaged in the United States or a commonwealth, territory, or possession thereof, in the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to Subchapter II of Chapter 135 of Title 49, United States Code. A marine terminal operator includes, but is not limited to, terminals owned or operated by states and their political subdivisions; railroads who perform port terminal services not covered by their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities. For the purposes of this part, marine terminal operator includes conferences of marine terminal operators.

The Commission cannot exercise personal jurisdiction over an entity that does not meet the definition of MTO prescribed by the Act. This limitation is absolute. In *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d 799 (1st Cir. 1990) (hereinafter "*Puerto Rico Ports Authority*"), the appeals court explained that meeting the definition of an MTO was a necessary predicate to a finding of Commission jurisdiction:

> Section 10(d)(1) of the 1984 Act provides, in relevant part, that no "marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the

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[4] *See also*, *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 27 S.R.R. 823, 201 (1996) (I.D. 1998, *affirmed*, 28 S.R.R. 751 (1999)); *Gaar v. Quirk*, 86 F.3d at 453; *Aetna Casualty & Surety Co. et al. v. Hillman, et al.*, 796 F.2d at 773; 5A Wright and Miller, FEDERAL PRACTICE AND PROCEDURE (1990), sec. 1350 at 226.

> receiving, handling, storing, or delivering property." *Id.* at § 1709(d)(1). A "marine terminal operator" is defined at § 3(15) as a person engaged "in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." *Id.* at § 1702(15). In order to uphold the Commission's exercise of jurisdiction in the instant case, we would have to conclude that . . . [the port] has become a "marine terminal operator" or "other person" as defined by the Shipping Acts.
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> To support the exercise of Commission jurisdiction, it must be determined initially that the one providing the service is a marine terminal operator – in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. Only then may a court turn to the second half of the jurisdictional inquiry under § 10(d)(1) and determine whether certain activities are related to or connected with receiving, handling, storing, or delivering property.

*Id.* at 802-03.

The court in *Puerto Rico Ports Authority* held that the definition of marine terminal operator should be given a "plain reading" in light of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (where the intent of Congress is clear, the inquiry is at an end for both the courts and the agency), so that if an entity does not own or operate any facilities serving common carriers by water, this fact should end the Commission's jurisdiction inquiry. *Puerto Rico Ports Authority*, 919 F.2d at 802.

The record is clear that POMTOC, not its members, is the party which, under the Lease, holds the right to operate the terminal facility. Continental, Ports America, Ports America Florida and FSI do not in their own rights own or lease any terminal facility in Miami, which is a key element for the MTO test. As demonstrated in the record, the individual POMTOC members do not own, lease, or otherwise furnish to any customers any wharves, docks, warehouses or other terminal facilities in the Port. PFF ¶¶ 4-7, 17,

22-30 Thus, Complainants have not met their burden of showing that jurisdiction exists with respect to the POMTOC members.

### 2. POMTOC Members Do Not Have Individual Control Over POMTOC

Complainants incorrectly argue that POMTOC members individually retain operational and financial control over terminal operations through veto power over POMTOC's significant business decisions and, because of this purported control, POMTOC members are MTOs. Complainants' Prehearing Statement at 1. Complainants misrepresent the relationship of POMTOC and its members, and ignore the plain language of the statute. First, POMTOC members cannot be held subject the to FMC jurisdiction by virtue of holding a minority stake in an MTO. *See Armada/GLTL East Africa Service (Agreement No. 10464)*, 22 S.R.R. 500, 513 (1983) (hereinafter "*Armada*") (The Commission held that incorporators do not become common carriers by water merely because they have formed a new company.)

Second, POMTOC members did not and have not retained individual operational and financial control over terminal operations by virtue of serving on POMTOC's board. They each have held equal minority stakes in the company (now Ports America Florida holds 50% interest), and major decisions require unanimous vote by all members. However, no single individual member has any control over POMTOC. The role of board members to direct company management and the unanimity requirement for major decisions in a manner entirely normal to any corporate governance procedure. These facts are insufficient to establish jurisdiction over POMTOC members. The test for determining MTO status set forth in *Puerto Rico Ports Authority* is controlling, making clear the statute means what it says (if an entity does not own or operate any facilities

serving common carriers by water, this fact should end the Commission's jurisdiction inquiry). 919 F.2d at 802.

POMTOC is a Florida limited liability company, and it is well established that neither the owners, members or managers of a limited liability company, simply by virtue of their ownership interests in the company, are liable for the acts, obligations or debts of the company. *See* FL. STAT. ANN. § 608.4227; *Thomas v. Hobbs*, 2005 WL 1653947 at *2 (Del. Super. Apr. 27, 2005); *Nielsen-Allen v. Industrial Maintenance Corp.*, 285 F. Supp. 2d 671 (D.V.I. 2002). Thus, as a matter of law, the status of Continental, FSI, and Ports America Florida as members of POMTOC, and of Ports America as indirect owner of Ports America Florida, cannot convert them into MTOs subject to Commission jurisdiction in this case.[5]

Complainants also incorrectly argue that each POMTOC member (and/or controlled affiliate) has ongoing agreements with POMTOC, such as the sharing of equipment and the provision of stevedoring services in conjunction with POMTOC's terminal services, and as a result they should be subject to FMC jurisdiction. *See* Complainants' Prehearing Statement at 1. However, the FMC has never ruled that leasing equipment to regulated entities makes unregulated entities fall under FMC authority notwithstanding the plain language of the definition of MTO.

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[5] Under the Shipping Act, persons meeting the definition of MTO (and other FMC-regulated entities, like "common carriers" and "ocean transportation intermediaries") are subject to a broad range of Commission regulatory restrictions and requirements, including registration with the Commission and various filing and oversight requirements. As a matter of day-to-day policy, the Commission generally has exercised care to limit the application of the Act regulatory regime to the individual entities defined in the Act, and not their various shareholders, owners, members, corporate parents and affiliates.

Ceres relies on strained analogies to decades-old cases involving how carriers were defined under the Shipping Act of 1916, to distract from the plain meaning of the MTO definition. These arguments are irrelevant to the definition of MTO.

For example, Complainants rely on two cases for the proposition that the POMTOC members are subject to FMC jurisdiction. Complainants' Reply to Respondents MTD at pp. 13-15. In *Agreement No. 9955-1*, 16 S.R.R. 141 (1975), the FMC upheld its jurisdiction over a conference agreement, which provides a procedure by which the entity created thereby acts as the vehicle through which the parties thereto conduct a joint service, charter vessels to the entity, share profits or losses, and establish corporate management of the entity. However, this decision is distinguishable from the facts in the instant case. The parties to Agreement No. 9955-1 were all carriers subject to FMC jurisdiction, while POMTOC members are not, having transferred their pre-existing terminal interest to the POMTOC company. In that case, the four parties thereto remained actively participating in foreign commerce of the United States. By contrast, none of POMTOC members provides marine terminal services in the Port of Miami, thus none of them are subject to the FMC .

In *Armada*, the ALJ found that the FMC had jurisdiction over the carrier agreement, under which the parties thereto would operate a common-carrier service as a joint venture. The ALJ stated three grounds for a finding of jurisdiction, none of which applies in the instant case. *Armada*, 22 S.R.R. at 515. As relevant here, in *Armada*, the parties to the agreement did not form a separate corporation or limited liability company like POMTOC did; rather, they established a partnership. One cannot compare the partners' involvement in a partnership, whereby they directly perform the services subject

to FMC jurisdiction, with POMTOC's members' rights, as board members, to oversee and vote on major POMTOC's decisions.

Complainants further rely in the Commission decision in *Dart Containerline Co.*, 22 S.R.R. 352 (1983), for the general proposition that a party to an agreement, which is non-regulated, may become regulated when the agreement contains a non-compete provision through which the entity binds its affiliates that are regulated entities. Complainants' Reply to Respondents MTD at p. 16. However, Complainants again incorrectly rely on a decision concerning FMC jurisdiction over pre-1984 Shipping Act carrier joint service arrangements, which facts are not applicable to the instant case. Also, in *Dart*, the parties share purchase agreement and the shareholders' agreement, which effectuate many of the provisions of the agreement on file with the FMC, imposed various obligations on the subsidiaries and affiliates thereto (regulated carriers), which obligations were not limited to non-compete provisions. By contrast, the POMTOC agreement does not impose the same sort of obligations on POMTOC's members' affiliates or subsidiaries.

Based on the declarations and testimonies of the parties on the record, none of the POMTOC members meets the MTO definition. None furnishes wharfage, dock, warehouse or other terminal facilities in the Port. PFF ¶¶ 4-7. Before POMTOC's formation, Continental and FSI did provide marine terminal services at the Port from their individual terminal facilities. In 1993, once POMTOC was created, they transferred the terminal functions to POMTOC and retained only the stevedoring functions. *See, e.g.*, Respondents Exh. 1 at ¶¶ 15-17, Respondents Exh. 14 at ¶ 14. Moreover, since the formation of Eller-ITO, and Continental's transfer of its stevedoring functions to Eller-

ITO, Continental does not even stevedore vessels, or indeed conduct any business with customers in the Port at all. Its only relationship to the dispute alleged in the Complaint is its membership interest in POMTOC, and that is not sufficient evidence to consider Continental an MTO subject to FMC jurisdiction. PFF ¶¶ 22-25.

FSI continues to provide only stevedoring services in the Port. *Id.* at ¶¶ 26-29. Stevedoring services are not included in the definition of MTO, and which are outside the scope of the Commission's regulation. *See, e.g., Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1166 (1997) ("Our action in condemning and preventing such unjust and unreasonable practices [against stevedores] does not constitute regulation of stevedoring."). *See also* 56 Fed. Reg. 22384, n.5 (May 15, 1991) ("Stevedores have not been held to be subject to the Commission's MTO filing requirements, provided that their services are limited to stevedoring and do not include either furnishing the terminal facilities upon which the stevedoring is performed, or furnishing terminal services involving the handling of cargo elsewhere than between the vessel and the 'point of rest'."). Complainants' attempts to bring stevedoring services within the jurisdiction of the FMC are erroneous and misplaced, and should be rejected.

Complainants argue that POMTOC members have ongoing arrangements with POMTOC concerning the provision of stevedoring services to POMTOC customers, and that stevedoring service is an "essential prerequisite to performance of terminal services, and indeed is often treated as an integral part of an MTO's terminal services for Shipping Act purposes." Complainants' Reply to Respondents MTD at p. 11. Complainants cite to *International Transportation Service, Inc. – Petition for Declaratory Order*, 23 S.R.R. 1005 (1986) for the proposition that terminal services agreements must be filed when

stevedoring is combined with wharfage and dockage services at a non-tariff rate. However, Complainants misread the Commission's holding in that case, whereby the Commission clarified that contracts or agreements between MTOs involving negotiated rates (even though such rates are exempt from the tariff filing requirements) are still subject to the filing requirements. *Id.* at 1006. Nothing in this case addresses the definition of, or the scope of FMC jurisdiction over, MTO's.

In addition, Complainants argue that FSI has performed MTO services (*e.g.*, stuffing and unstuffing containers, consolidating and deconsolidating cargo, moving cargo other than between vessel and point of rest) and that a number of FSI's contracts with VOCC explicitly cover both stevedoring and, separately, "terminal services" (such as striping/stuffing containers carried on the vessel). Complainants' Prehearing Statement at 2. This analysis is quite flawed. Complainants disregard undisputed record in this case stating that FSI has provided some cargo handling services, but FSI has not, and does not, provide any "facilities" as the definition of MTO requires. Instead, these services are provided either at the POMTOC facility or at a facility controlled by the Port. *See* Respondents Exh. 2 at ¶¶ 11-13. *See, also*, Complainants Exh. 211 (Responses to Requests 23-25).[6]

Ports America Florida does provide marine terminal services in the Port of Tampa, but it does not provide such services in the Port of Miami. Ports America is a marine terminal operator in several ports in the United States, but it does not provide such services at the Port of Miami, and itself does not own any direct interest in POMTOC. Its

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[6] In addition, FSI contracts with carriers explicitly provide that the terminal services will be provided by POMTOC, not FSI. *See, e.g.*, Complainants Exh. 180, 183-85, Section 3.

only relationship to POMTOC is its indirect ownership of Ports America Florida. PFF ¶¶ 7, 30. Complainants argue that because Ports America and Ports America Florida are MTOs in other ports of the country, they are subject to FMC *in personam* jurisdiction in this case. Complainants Prehearing Statement at ¶ 2. We disagree. In contrast to its test for jurisdiction over carriers, which is nationwide, the FMC takes a port-by-port approach to determining MTO status, as the court employed in *Puerto Rico Ports Authority*, 919 F.2d at 802-03.

Complainants further attempt to impose jurisdiction on Ports America Florida and Continental by virtue of their ownership of Eller-ITO. *See* Complainants' Prehearing Statement at 2. Complainants also incorrectly state that Eller-ITO is an MTO. *Id.* Eller-ITO is a stevedoring company that performs stevedoring in the POMTOC facility, the Port of Miami and Port Everglades. It has been dismissed from this case, and in any event, its status has no bearing on whether its owners or affiliates meet the test for an MTO. PFF ¶ 8.

Complainants various arguments to expand the definition of "MTO" to include shareholders or owners (as shareholders or owners) are incorrect and baseless. If accepted, Complainants' arguments would have substantial and chaotic effects on normal business relationships and the administration of the Commission's regulatory programs. Such a finding would effectively expand the universe of companies subject to the Commission oversight, filing requirements, complaint and enforcement proceedings exponentially. Because the definition of MTO would hinge not on the clear text of the statute, but rather on the grey-area arguments relating of control and affiliation that Complainants advance, affiliates of regulated parties would be in a state of constant

uncertainty and risk regarding their regulatory obligations and the scope of the Commission's jurisdiction.

In short, POMTOC is the terminal operator involved in this proceeding, and it is POMTOC's practices that are at issue. POMTOC, and not its members, is the only properly named respondent. None of the activities of Continental, FSI, Ports America and Ports America Florida in the Port constitute "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." None of them hold rights over terminals on which to operate. Therefore, Complainants have failed to show that these parties meet the jurisdictional threshold test for "marine terminal operator" status, and they should be dismissed from the proceeding.

### 3. The Fact that the POMTOC Members Incorrectly Identified Themselves in FMC Filings as MTOs Does Not Covert them Into Regulated Entities Subject to FMC Jurisdiction

Complainants incorrectly argue that because POMTOC members represented in earlier FMC agreement filings that they are MTOs, they bear a heavy burden of showing now that they are not MTOs. Complainants Reply to Respondents MTD at p. 6. However, now that Respondents have contested jurisdiction (and explained that the earlier administrative filings were administrative errors), Ceres still has the burden of proving that the POMTOC members are MTOs. The FMC has held that the status of a person is not determined by his or her own declaration of what he or she is, but rather what he or she is in fact actually doing. *See Marine Terminal Practices of the Port of Seattle, adopted* 18 S.R.R. 1029 (1978).

Thus, a proper determination of whether POMTOC members are MTOs centers on a consideration of the facts on the ground, *i.e.*, do they actually provide a real marine

terminal facility. While it is correct that the POMTOC members indicated in FMC agreement filings years ago that they were MTOs, this was nothing more than an (understandably confused) conclusion of law offered by non-lawyers about a federal regulatory statute they had little experience with. This statement should not be considered as "evidence" that they are indeed providing marine terminal facilities in the Port of Miami.

When POMTOC was first established, the 1992 Marine Terminal Agreement among the four founding members of POMTOC was filed with the FMC, and the parties thereto were indeed MTOs subject to the filing requirements of the Commission. *See* last page of Exh. B to the Complaint.[7] Thereafter, the then-members of POMTOC entered into a 1993 Operating Agreement setting forth the terms and conditions for the parties' investments in POMTOC, its management, operations, and members' requirements. *See* Exh. B to the Complaint. Once POMTOC members made the applicable capital contributions and contributed certain of their contracts, equipment leases and other assets to POMTOC (in early 1993), their marine terminal operations were shifted to POMTOC, a newly formed joint venture, which was a separately formed limited liability company under Florida law. At that point, the individual members ceased their terminal operations, and therefore were no longer MTOs subject to the FMC agreement filings requirement.

With the benefit of hindsight and legal counsel, we know now that the parties to FMC Agreement No. 224-200616 should have requested that the agreement be

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[7] The 1992 agreement provides authority for the parties to meet, discuss and agree as to how POMTOC is to be organized to carry on activities as an MTO. It explicitly states that "currently" each of the members of POMTOC perform marine terminal services. *See* Section I thereto.

withdrawn, but by error, that did not occur. As indicated in Mr. Rovirosa's Rebuttal Testimony, POMTOC only retained FMC counsel in August of 2005. *See* Respondents Exh. 12 at ¶ 60. Before then, it apparently had relied on incorrect advice given by a tariff filing entity, which is no longer operating. By mistake and unawareness of the correct facts and the law, POMTOC continued filing non-substantive modifications to the Agreement No. 24-200616 regarding replacement of members from time to time.

This error may have occurred because the person drafting the amendments and/or making the filings with the Commission was confused regarding FMC jurisdiction and filing requirements. Also, the statement in the agreements on file with the FMC that POMTOC members were MTOs was incorrectly carried over from the original 1992 agreement, when the founders of POMTOC were indeed operating marine terminal facilities in the Port of Miami. *See, e.g.*, Respondents Exh. 2 at ¶¶ 14-15.

**4. Complainants' Claims that POMTOC Has Not Lawfully Existed Since 1999 Because the 1999 Agreement Was Not Filed and That the Marine Terminal Operations Post-1999 Must Be Attributed to POMTOC Members are Flawed and in Error**

Complainants argue that the 1999 Amended and Restated Regulations of POMTOC should have been filed with the Commission. Complainants argue that unfiled agreements cannot be accorded legal effect, and since this 1999 agreement was not filed, it was unlawful and, as a result, POMTOC has not lawfully existed since 1999 insofar as the Act is concerned. Complainants Reply to Respondents MTD at pp. 7-8. Complainants incorrectly conclude that the MTO operations performed under the 1999 agreement must be attributed to POMTOC's members, which must be deemed MTOs subject to FMC jurisdiction. *Id.* Complainants' arguments and conclusions are far fetched and outrageous, and completely ignore the factual realities of POMTOC's

business of providing terminal services, while its members provide stevedoring services (directly or through Eller-ITO). Nothing in the Shipping Act or FMC rules has the effect of negating, *ab initio*, 10 years of lawful existence of companies that miss the filing of administrative updates to a filed agreement. POMTOC owes its existence to the Florida State corporation laws. The FMC is without authority to declare POMTOC's status as an LLC, and all POMTOC's contracts, null and void.[8]

### E. POMTOC Members Have Not Violated FMC Agreement Filing Requirements

Ceres' allegations that Respondents have failed to file certain alleged agreements with the FMC in violation of the Act is without merit. POMTOC members are not subject to the agreement filing requirements because they are not MTOs, and their agreements are not exclusive, preferential, or cooperative working arrangements. Even if POMTOC members were considered to be MTOs, these alleged missed filings (which are minor administrative updates to POMTOC's operating rules) would be exempted from the filing requirements under the "routine operational and administrative matters" exemption.

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[8] In addition, the cases cited by Complainants for the proposition that unfiled agreements or modifications are unlawful until they are filed do not apply here. Complainants Reply to Respondents MTD at pp. 4-5, n.6. *Swift & Co. v.* FMC, 306 F.2d 277 (D.C. Cir. 1962), addressed the issue of how, under the 1916 Act, carrier conference agreements needed affirmative approval from the FMC to become effective. These cases are inapposite. The agreement approval statutory authorities were abolished in 1984; moreover, the instant case involves neither shipping lines nor price-fixing conference agreements. The cases cited by Complainants involve unfiled conference and pooling agreements among shippers or other entities subject to the FMC. By contrast, the 1999 agreement is a corporate document that combines and simplifies several pre-existing corporate rules and operational documents involving the operation, management, membership, and other governance issues of POMTOC. To the extent that it is different from or an evolution from the 1993 operating agreement, the changes are trivial and go only to minor refinements of operational and corporate management matters.

### 1. Unfiled Agreements at Issue Are Not Required to Be Filed Because at the Time These Agreements Were Entered Into, the Parties Thereto Were Not MTOs

In their Prehearing Statement, Complainants argue that the Shipping Act requires MTOs to file cooperative or exclusive agreements, and prohibits MTOs to fail to adhere to their filed agreements or from making or implementing agreements that should have been filed but were not. Complainants go on to argue that POMTOC and its members have violated these requirements. Complainants Prehearing Statement at ¶ 2. These allegations are unfounded and misrepresent the facts. As explained above, POMTOC members are not MTOs, thus are under no obligation to file their agreements with the FMC. Section 4(b) of the Shipping Act provides that the agreement filing requirements apply:

> to an agreement between or among **marine terminal operators**, or between or among one or more marine terminal operators and one or more ocean common carriers, to (1) discuss, fix, or regulate rates or other conditions of service; or (2) engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States.

46 U.S.C. § 40301(b) (emphasis added).

Prior to POMTOC formation, POMTOC's founding members were MTOs and did file Agreement No. 224-200616 and its Amendment No. 1 in accordance with FMC rules. However, once the terminal assets and functions were transferred to POMTOC and the members no longer individually furnished wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, they were no longer MTOs.[9]

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[9] The actual transfer of the terminal assets was not subject to FMC jurisdiction. The then-effective 46 U.S.C. App. § 1703 stated: "this Act does not apply to any acquisition by any person, directly or indirectly, of any voting security or assets of any other person." Thus, and because the parties were no longer MTOs, subsequent, non-substantive amendments to the FMC agreement on file with the FMC were made and filed in error and Agreement No. 224-200616 should have been withdrawn.

The 1999 Amended and Restated Regulations effectively combine and simplify several documents involving the operation, management, membership, and other governance issues of POMTOC, including, without limitation, the company organizational provisions first laid out in FMC Agreement No. 224-200616. A close reading of the agreements shows no indication of independent marine terminal operators entering into a cooperative or exclusive agreement regarding their respective facilities. Rather, it is a detailed corporate management and operation document of POMTOC controlling the rights of the owner stakeholders in the company. We are aware of no case where the FMC has required such an agreement be filed.

Therefore, because the parties to the 1999 agreement and its 2005 amendment were not MTOs, and these agreements show no sign of being an exclusive, preferential, or cooperative working arrangements between independent MTOs, they were not subject to the FMC agreement filing requirement.

### 2. Even if POMTOC Members Were Subject to the FMC Agreement Filing Requirements, the Agreements at Issue Were Exempted

Even if POMTOC members would be considered MTOs by the ALJ, the unfiled agreements and amendments at issue are and were routine administrative agreements then exempt from the FMC filing requirements.

The exemption from filing agreements with the FMC for the "interstitial implementation of routine operational and administrative matters" under former Section 535.407(c) was intended to allow "flexibility to make changes for tariff matters or routine operational and administrative maters having no anticompetitive effect." *See*

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Complainants' efforts to characterize this honest mistake as a mischief should be dismissed.

*Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, Notice of Proposed Rulemaking, 68 Fed. Reg. 67,510, 67,517 (2003), citing 49 Fed. Reg. 36,372 (1984).[10] POMTOC's allegedly unfiled agreements at issue in this proceeding consisted of gap-filling explanations and minor administrative adjustments to corporate governance provisions that, in many instances had already been filed. While the exemption from the FMC agreement filing requirements was narrow in scope and led to widespread confusion (both within the FMC and the industry; *see* the above-noted rulemaking and n.10), the routine operational and administrative nature of the adjustments to POMTOC's corporate and administrative rules likely would have qualified them for the filing exemption.

In one of the very few cases applying the exemption, *Compania Sud Americana de Vapores S.A. v. Inter-American Freight Conference*, 28 S.R.R. 137, 142 (1998), the Commission held that:

> Commission precedent supports the notion that certain routine matters need not be filed. In *Section 15 Inquiry*, 1 USSB 121, 125 (1927), the United States Shipping Board, this agency's predecessor, held that requiring the filing of routine operations was not necessary, as such a requirement would "result in delays and inconvenience to both carriers and shippers." *See also Port of New York Auth. v. Federal Maritime Comm'n*, 429 F.2d 663, 667 (5th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971) (upholding the Commission's determination that routine matters need not be filed). In its explanation for the interstitial provision of § 572.407(c), the Commission has stated, "[t]he rule allows flexibility to make changes for tariff matters or routine operational and administrative matters having no anticompetitive effect." *Amendments to Rules Governing Agreements under the 1984 Act*, 22 S.R.R. 1175, 1178 (1984). Both the plain language of section 572.407(c) and the precedent that led up to that regulation indicate the Commission's conclusion that routine, interstitial matters need not be filed.
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> . . . .

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[10] The Commission decided to remove the exemption provided in former Section 535.407(c), which has been a "prime source of confusion" (*id.*), and replace it with a list of specific exemptions for certain types of operations. 68 Fed. Reg. 67,510, 67,517 (2003). The Commission issued a final rule on this issue, effective January 3, 2005. 69 Fed. Reg. 6,439 (2004).

> When the Commission codified the filing exception for agreements "concern[ing] routine operational or administrative matters," it indicated an intention to "allow [] flexibility to make changes for tariff matters and routine operational and administrative matters having no anticompetitive effect." *Amendments to Rules*, 22 S.R.R. at 1178. The Commission's concern with "flexibility" was to prevent the parties from having to file ordinary day-to-day administrative or operational functions; the Commission cited, as an example, the establishment of individual tariff rates.

*Id.* at 143 (footnotes omitted).

In *Compania Sud Americana de Vapores S.A.*, the FMC found that the agreement to shut down the entity subject to the agreement at issue, on the other hand, was not the type of day-to-day administrative decision that requires operational flexibility. Rather, the member lines undertook a one-time dissolution of an ongoing enterprise, which employed a substantial staff devoted to facilitating the operations of the IAFC (and, apparently, other conferences), resulting in a significant one-time cost to the agreement lines.

Complainants also argue that the alleged unfiled agreements at issue are the type of anticompetitive agreements the Act requires to be filed. Complainants go on to state that these alleged violations are far from a failure to meet technical filing requirements and involve the making and implementation of highly anticompetitive agreements that have directly harmed Complainants and their customers. Complainants' Prehearing Statement at ¶ 4. The record does not support these allegations. A comparison of the agreement text on file with the FMC against the text of the updated POMTOC operating rules shows that the alleged unfiled amendments were updates of an administrative, operational and corporate nature, and had no impact on competition.

In addition, Complainants have not brought forth any plausible allegations and supporting evidence regarding how they were materially harmed by the alleged failure to

file these agreements with the FMC. In addition, we note that, with regard to the recovery of reparations, the alleged failure to file primarily occurred years before Complainants' sought to utilize POMTOC's facilities, meaning that reparations awards are time barred under 46 U.S.C. § 41301(a) ("If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.") Accordingly, these factors entitle Respondents to judgment as a matter of law on the issue of reparations for Count I.

## IV. CONCLUSION

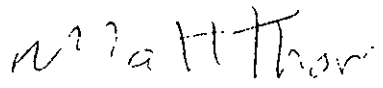
A full defense of POMTOC's activities must await review of Complainants' initial brief. The defense outlined in this paper anticipates arguments that POMTOC deems likely, given past actions of Ceres. What can be stated clearly at this point, however, is that this litigation is, at its core, a determined and insistent effort of Complainants to force entry to a particular marine terminal facility in a South Florida complex of ports and container facilities that offer Ceres numerous options. Ceres has asked that the FMC grant Ceres access to POMTOC's marine terminal facilities on terms that no reasonable business man could accept. Ceres has invoked federal law and the processes of this Commission to provide the battering ram to effect a forced entry on POMTOC's property. Indeed, it is Ceres' fixation on getting a great deal for very little at POMTOC's expense that no doubt has prevented it from making alternative, realistic business arrangements with any of a number of potential alternative partners in the Miami/Port Everglades market.

POMTOC has violated no laws administered by the FMC. It has unsuccessfully urged Ceres to negotiate a business arrangement, and Ceres, not POMTOC, has refused

to negotiate. The practices and activities of POMTOC are "reasonable" both in the commonly understood business context of that word, and in the parameters of the term as it informs the meaning of statutes on which Ceres here relies. POMTOC members are not Marine Terminal Operators subject to the personal jurisdiction of the Commission and Ceres' theories to the contrary are strained and attenuated constructs designed to further Complainants' designs to take by law what they do not wish to pay for in the market. Federal law requires no such result, and, indeed protects citizens against such takings when compelled by governmental action.

The correct disposition of this complaint should not only emphatically deny Ceres its requested relief, but should be articulated in such a way to prevent further actions of this sort by Ceres or other marine terminal operators.

Respectfully submitted,



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Dated: April 17, 2009

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I hereby certify that on this 17th day of April 2009, a copy of the foregoing Respondents' Opening Brief was served on the following persons:

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